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## **Avoiding a Hard Irish Border: Time to Move from Magical Thinking to Specific Solutions**

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## 4. Avoiding a Hard Irish Border: Time to Move from Magical Thinking to Specific Solutions

*Katy Hayward*

Progress on the issue of Northern Ireland/Ireland must be made before the European Council summit in June 2018. For this to happen, the UK government has to put forward proposals that meet the commitments it made in the [Joint Report of December 2017](#). These included avoiding a hard border on the island of Ireland, protecting North-South cooperation and supporting the all-island economy and the operation of the 1998 Agreement.

Any proposal from the UK government must be more substantive than those ideas offered in its [August 2017 position paper](#) and in any of the Prime Minister's speeches. The EU has criticised those proposals as 'magical thinking'. UK ministers' vague but repeated references to as yet untested 'technological solutions' fail to reassure the EU, which is concerned that its strict trade rules can be enforced, will be enforced and *will be seen to be enforced* by post-Brexit UK.

In this way, the Northern Ireland/Ireland issue is a litmus test for the UK's whole approach to its future relationship with the EU. What it puts forward in terms of avoiding a hard Irish border demonstrates its grasp of the implications of leaving the single market and customs union.

The December Joint Report allows for three broad scenarios in this regard. The first is one in which a UK-EU free trade agreement somehow manages to uphold the UK's commitments to avoiding a hard border and having no physical checks or controls at the Irish border. The efforts by UK ministers to concentrate on having checks and controls that are not physically at the border represents a very literal interpretation of 'hard border' and manages to miss the main point. That is, if the UK is heading for a 'hard Brexit' (i.e. withdrawing from the arrangements that serve to make member state borders frictionless), this by definition means a hard Irish border.

If scenario one is in there as a political sop for Brexiteers, the third scenario is a sop for EU integrationists. It is a scenario in which the UK aligns with the rules of the internal market and customs union – thus effectively a 'Brexit in name only'. Following the rules whilst having so little input into their creation would, it might be said, be a bizarre and pointless outcome for an exercise intended to 'take back control'.

The most likely outcome is, therefore, one in which 'specific solutions' are found for Northern Ireland (NI). These could conceivably entail a situation in which there are slightly different outcomes for the UK and for NI, such as if the UK has a version of 'association' status ('CETA-plus') whilst NI has a version of 'EEA-minus'. There will need to be mechanisms to manage diverging trajectories of the EU and UK without Northern Ireland 'falling in between'. A fully functioning devolved executive and assembly, plus the institutions at Strand 2 (North-South) and Strand 3 (British-Irish), will be the minimal mechanisms of governance needed to manage this effectively.

What is currently on the table – the [protocol on Ireland/Northern Ireland](#) in the draft withdrawal agreement – looks most like a version of 'specific solutions'. This backstop option enabled progress into phase 2 of the talks, but neither the UK nor the EU would

be happy if it ended up being the outcome from the strand of talks dedicated to this issue. Indeed, the backstop option was roundly rejected by the UK government – not because it was so low-ambition for Northern Ireland, but because it would mean different treatment of Northern Ireland, to the extent of it being part of the EU's customs territory. From a different perspective, the backstop is disappointingly limited – its primary focus is to protect what NI currently enjoys in terms of trade with Ireland, but it does so in restricted terms (i.e. it doesn't extend to other spheres, such as the movement of services).

Nevertheless, the 'backstop' option does demonstrate that the EU has held true to its commitment to be ['flexible and imaginative'](#) – for, in this option, the EU offers de facto EEA membership to (a) a sub-national region and (b) to cover just one of the four freedoms (i.e. free movement of goods). In principle, the UK could seek to exploit this flexibility from the EU for the benefit of Northern Ireland, but this would require confirming bespoke arrangements for the region and negotiating a UK-wide customs union with the EU. But we are very far from that possibility as yet.

The 'colour-coded' version of the draft protocol indicates that there is little that is currently agreed between the UK and the EU on Ireland/Northern Ireland: the continuation of the Common Travel Area (already accepted by the EU, as seen in the two countries' exclusion from the Schengen zone), the need to 'maintain the necessary conditions for continued North-South cooperation' across several areas (such as education, tourism, justice and security), the freedom of the UK to continue to build on the 1998 Agreement, and the creation of a specialised committee for the implementation of this protocol.

The objectives of protecting Irish citizens' rights in NI, the rules on state aid for NI, and a single electricity market are agreed, but the matter of how these would be achieved is not. In the coming few weeks, the UK and EU therefore have to find agreement on a wide and complex spectrum of issues for Northern Ireland/Ireland, including free movement of goods across the Irish border, agriculture and fisheries, environment, supervision and enforcement, and the application of EU regulations in Northern Ireland.

A strong starting point would be if the UK comes out and clearly states that 'specific solutions' are necessary to meet the commitments it has made to Northern Ireland, both in the Joint Report and in the 1998 Agreement.

As things stand, however, there is a real risk that – far from enjoying the 'best of both worlds' – Northern Ireland could fall between the rock of the EU's determination not to bend rules and the hard place of the UK's intransigence on intra-UK differentiation.